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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re: * Case No.: 11-31376

HOWREY LLP, * Chapter 11

Debtor. * Date: TBD
* Time: TBD
* Ctrm: U.S. Bankruptcy Court
230 Pine Street
* San Francisco, CA

* * * * * * * * Judge: Dennis J. Montali

SECOND JOINT MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND ALLAN B. DIAMOND, CHAPTER 11 TRUSTEE, PURSUANT TO 11 U.S.C. §§ 105(a), 1103(c), AND 1109(b) FOR ENTRY OF AN ORDER GRANTING

1 **LEAVE, STANDING, AND AUTHORITY TO COMMITTEE TO PROSECUTE AND**
2 **SETTLE CERTAIN CAUSES OF ACTION ON BEHALF OF THE DEBTOR'S ESTATE**

3 TO THE HONORABLE DENNIS J. MONTALI:

4 The Official Committee of Unsecured Creditors of Howrey, LLP (the "Committee") and
5 Allan B. Diamond, Chapter 11 Trustee (the "Trustee") respectfully file this Second Joint Motion
6 of the Official Committee Of Unsecured Creditors and Allan B. Diamond, Chapter 11 Trustee
7 Pursuant to 11 U.S.C. §§ 105(a), 1103(c), and 1109(b) for Entry of an Order Granting Leave,
8 Standing, and Authority to Committee to Prosecute and Settle Certain Causes of Action on Behalf
9 of the Debtor's Estate (the "Motion"), and in support thereof, state as follows:

10 **JURISDICTION AND VENUE**

11 This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334.
12 Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding
13 pursuant to 28 U.S.C. § 157(b). The statutory predicates for the relief requested herein are
14 sections 105(a), 1103(c), and 1109(b) of title 11 of the United States Code (the "Bankruptcy
15 Code").

16 **BACKGROUND AND BASIS FOR REQUESTED RELIEF**

17 1. On April 11, 2011, an involuntary petition under chapter 7 was filed against
18 Howrey LLP (the "Debtor"). On June 6, 2011, the Debtor filed its Conditional Consent to Entry
19 of Order for Relief and Motion to Convert Debtor's Case to Chapter 11.

20 2. On or about June 14, 2011, the Office of the United States Trustee appointed the
21 following creditors of the Debtor to serve on the Committee:

22 a. Hines REIT 321 North Clark Street LLC;¹
23 b. LexisNexis, Inc.;¹

24
25
26
27
28 ¹ Hines REIT, LexisNexis, Dewey & LeBoeuf LLP and Matura Farrington Staffing Services, Inc.
 subsequently resigned from the Committee.

- 1 c. Dewey & LeBoeuf LLP¹;
- 2 d. Dun & Bradstreet;
- 3 e. EMC Corporation;
- 4 f. Matura Farrington Staffing Services, Inc.; and
- 5 g. Stephanie Y. Langley.

6
7 3. On September 15, 2011, the Debtor's pre-petition secured lender, Citibank, N.A.
8 filed its Motion For Entry of an Order Converting the Debtors Chapter 11 Case to a Case under
9 Chapter 7 of the Bankruptcy Code, or, in the Alternative, Appointing a Chapter 11 Trustee [Dkt.
10 No. 315] (the "Trustee Motion"). On September 22, 2011, the Court entered an order granting the
11 Trustee Motion, and ordering the appointment of a chapter 11 trustee. [Dkt. No. 335].
12

13 4. On October 7, 2011, the Office of the U.S. Trustee filed a motion to appoint Allan
14 B. Diamond as Chapter 11 Trustee [Dkt. No. 369], which was granted on October 12, 2011. [Dkt
15 No. 376].

16 5. The Trustee and the Committee have conducted an investigation of potential assets
17 of the estate, such as litigation claims. *See First Interim Report of Chapter 11 Trustee Allan B.*
18 *Diamond, pp. 23-25 [Dkt. No. 765], Second Interim Report of Chapter 11 Trustee Allan B.*
19 *Diamond, pp. 23-27 [Dkt. No. 978]*. The Trustee and the Committee believe that the estate has
20 substantial litigation claims relating, among other things, to the Debtor's unfinished business,
21 distributions to former partners and acts and omissions by members the Debtor's dissolution
22 committee.
23

24
25 6. On November 21, 2012, the Trustee and Committee filed their *Joint Motion of the*
26 *Official Committee of Unsecured Creditors and Allan B. Diamond, Chapter 11 Trustee for Entry*
27 *of an Order Granting Leave, Standing, and Authority to Committee to Prosecute and Settle*
28

1 *Certain Causes of Action on Behalf of the Debtor's Estate* (the "First Motion for Derivative
2 Authority," Docket No. 873), seeking that the Court grant derivative authority to the Committee
3 to, *inter alia*, pursue causes of action against Arnold & Porter LLP, Arent Fox LLP, and Snell &
4 Wilmer LLP as well as former Howrey partners who became affiliated with those firms, and any
5 subsequent transferees. On December 24, 2012, the Court entered an order granting the First
6 Motion for Derivative Authority. Docket No. 943.

7 7. As is disclosed in the Supplemental 2014 statement filed simultaneously with this
8 Motion, Diamond McCarthy LLP, with the Trustee as lead counsel, recently has been engaged as
9 special litigation counsel to Alan M. Jacobs, the trustee of the Dewey & LeBouef Liquidation
10 Trust (the "DL Liquidation Trust").

11 8. Dewey & LeBouef LLP ("Dewey") asserts claims against Howrey. Dewey is a
12 former landlord of Howrey and a former member of the Committee. After it filed bankruptcy,
13 Dewey resigned from the Committee.

14 9. Howrey asserts claims against Dewey. Certain former partners of Howrey –
15 including, without limitation, Henry Bunsow, Roxann Henry, Denise De Mory, Joseph Lavelle,
16 Jacqueline Grise Lester, Marc Schildkraut, Brian Smith, and MaryJane Moltenbrey – joined
17 Dewey after leaving Howrey.² Howrey may therefore have unfinished business claims, or similar
18 causes of action, against Dewey and has filed a proof of claim to that effect in Dewey's
19 bankruptcy.

20 10. Further, both Howrey and Dewey have asserted unfinished business claims, partner
21 claw backs, and similar causes of action against the law firms that its former partners joined after
22 they left Dewey. Those law firms include Bunsow De Mory Smith & Allison LLP ("BDSA"),
23

24
25
26
27
28 ² Another former partner, Cecil Key, joined Howrey after leaving Dewey.

1 Paul Hastings LLP (“Paul Hastings”); Morrison & Foerster LLP (“Morrison & Foerster”), Cooley
2 LLP (“Cooley”), and Dickinson Wright, PLLC (“Dickinson Wright”).

3 11. Further, the Howrey estate has claims against other former partners who joined the
4 law firms listed above without a connection to Dewey. These former partners include Ezra Levine
5 and Thomas McQuail, who joined Morrison & Foerster, Mark Schechter, who joined Cooley, and
6 Clayton Scott Hataway, who joined Paul Hastings.
7

8 12. Dewey has resolved some of its claims against some of these firms and the partners
9 it hired (including, for example, BDSA and Paul Hastings). Additionally, certain former Dewey
10 partners, including Cecil E. Key, are prosecuting claims in Dewey’s bankruptcy case.
11

12 13. Because of the foregoing, Dewey, BDSA, Cooley, Dickinson Wright, Paul
13 Hastings, and Morrison & Foerster, as well as any former Howrey partners who became, or have
14 been, affiliated with the foregoing firms³ (the “Connection Parties”) have been identified as
15 potential targets for (among other potential claims) unfinished business and/or partner
16 overpayment claims owned by the Debtor’s estate. The Trustee believes that his connections with
17 the Connection Parties may present a direct conflict of interest, and wishes to avoid even the
18 appearance of any impropriety in developing and resolving the Estate’s potential claims against
19 the Connection Parties.
20

21 14. In light of the connections described above, the Trustee has requested and the
22 Committee has agreed to handle the investigation, development and pursuit of any claims or
23 litigation between the Debtor’s estate and the Connection Parties.
24

25

26 27 28 ³ Former Howrey partners who are now or were affiliated (or have been affiliated) with the above-referenced firms include Henry Bunsow, Denise De Mory, Brian Smith, Clayton Scott Hataway, Marc Schildkraut, Mark Schechter, Roxann E. Henry, Cecil E. Key, Joseph Lavelle, Jacqueline Grise Lester, Ezra C. Levine, Thomas McQuail, and MaryJane Moltenbrey.

RELIEF REQUESTED

15. The Committee and Trustee hereby request that this Court grant leave and standing to the Committee to commence, prosecute and, subject to further Court approval, settle claims of the bankruptcy estate against the Connection Parties. Additionally, for the avoidance of doubt, the Committee seeks specific authority to enter into tolling agreements with the Connection Parties in order to toll applicable statutes of limitation. Further, certain of the Connection Parties have filed proofs of claim in the Debtor's bankruptcy case, or have been scheduled as having, or may assert, potential claims or setoffs. The Committee already has standing under Section 1109 of the Bankruptcy Code to file objections to creditor claims or setoffs. Nevertheless, to avoid any doubt regarding the Committee's standing, the Trustee and the Committee seek specific authority for the Committee to prosecute objections to creditor claims or setoffs with respect to the Connection Parties.

Basis for Relief

16. The Bankruptcy Code establishes a creditors' committee for the express purpose of protecting the rights of its constituents and similarly situated creditors. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977), reprinted in U.S.C.C.A.N. 1978, p. 5787. In furtherance of this purpose, section 1103(c) of the Bankruptcy Code, which enumerates the statutory functions of a creditors' committee, authorizes creditors' committees to "perform such other services as are in the interest of those represented." 11 U.S.C. § 1103(c)(5).

17. To that end, section 1109(b) of the Bankruptcy Code provides, in pertinent part, that “[a] party in interest, including... a creditors’ committee... may raise and may appear and be heard on any issue in a case under this chapter.” 11 U.S.C. § 1109(b). This general right to be heard would be rendered meaningless with respect to creditors’ committees unless such

1 committees are also given the right to act on behalf of the estate in certain circumstances. *See In*
2 *re iPCS, Inc.*, 297 B.R. 283, 290 (Bankr. N.D. Ga. 2003) (“[I]f a debtor has a cognizable claim,
3 but refuses to pursue that claim, an important objective of the Code [the recovery and collection of
4 estate property] would be impeded if the bankruptcy court has no power to authorize another party
5 to proceed on behalf of the estate in the debtor’s stead.”); *see also Official Comm. of Unsecured*
6 *Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3rd Cir. 2003) (en banc) (holding
7 Sections 1101(c)(5) and 1109(b) of the Bankruptcy Code implicitly authorize a court to grant a
8 creditors’ committee derivative standing to prosecute an avoidance action when the trustee or
9 debtor in possession cannot or will not do so, or is unlikely to act); *In re Joyanna Holitogs, Inc.*,
10 21 B.R. 323, 326 (Bankr. S.D.N.Y. 1982) (holding that general right to be heard would be an
11 empty grant unless those who have such a right are also given the right to do something where the
12 statutorily authorized parties can or will not).
13
14

15 18. The practice of conferring derivative standing to pursue actions on behalf of a
16 bankruptcy estate is accepted in the Ninth Circuit. *See Avalanche Maritime, Ltd. v. Parekh (In re*
17 *Parmetex, Inc.*), 199 F.3d 1029, 1031 (9th Cir. 1999) (holding that creditors had standing to
18 pursue avoidance action when bankruptcy court approved stipulation between trustee and creditor
19 granting such standing); *Liberty Mut. Ins. Co. v. Official Unsecured Creditors’ Comm. of*
20 *Spaulding Composites Co. (In re Spaulding Composites Co.)*, 207 B.R. 899, 903 (B.A.P. 9th Cir.
21 1997) (holding that creditors committee was properly granted derivative standing and stating
22 that “[i]t is well settled that in appropriate situations the bankruptcy court may allow a party other
23 than the trustee or debtor-in-possession to pursue the estate’s litigation.”). A potential conflict for
24 the Trustee is grounds for the Court to grant derivative standing to the Committee. *Catwil Corp.*
25 *by & Through Official Comm. of Unsecured Creditors v. Derf II (In re Catwil Corp.)*, 175 B.R.
26
27
28

1 362, 365 (Bankr. E.D. Cal. 1994) (when debtor-in-possession's counsel admitted conflict of
2 interest prevented him from pursuing causes of action of estate, it was appropriate to grant
3 derivative standing to Committee).

4 19. In granting derivative authority, Courts within this circuit consider whether "1) a
5 demand has been made upon the statutorily authorized party to take action; 2) the demand is
6 declined; 3) a colorable claim that would benefit the estate if successful exists, based on a cost-
7 benefit analysis performed by the court, and 4) the inaction is an abuse of discretion ('unjustified')
8 in light of the debtor-in-possession's duties in a Chapter 11 case." *In re Valley Park*, 217 B.R.
9 864, 866 (Bankr. D. Mont. 1998).

10 20. With respect to the first, second and fourth requirements, as noted above, the
11 Trustee has consented to and indeed requested that the Committee investigate, and if necessary,
12 pursue and defend all claims as may exist between the Debtor's estate and the Connection Parties.
13 The Trustee's consent renders demand futile, and thus, the first, second and fourth requirements
14 have been satisfied. See *In re Valley Park*, 217 B.R. at 867 (consent from statutorily authorized
15 party "obviates the need for strict application of the first, second, and fourth considerations"); see
16 also *In re First Capital Holdings Corp.*, 146 B.R. 7, 13 (Bankr. C.D. Cal. 1992) (creditors'
17 committee would be excused from making a demand on a debtor to pursue action against its
18 officers, directors and controlling shareholders where such a demand would be futile).

19 21. With respect to the third requirement, that the claims be "colorable," the threshold
20 for establishing that a claim is "colorable" is low. See, e.g., *In re Valley Park*, 217 B.R. 864, 869
21 n.4 (Bankr. D. Mont. 1998) (holding that the committee "does not have to satisfy the quantum of
22 proof necessary for a judgment in order to show a colorable claim"); *In re Adelphia Commc'nns*
23 Corp., 330 B.R. 364, 376 (Bankr. S.D.N.Y. 2005) (holding that the requisite standard for
24

1 presenting a “colorable” claim is relatively easy to meet); *In re America’s Hobby Ctr.*, 223 B.R.
2 275, 288 (Bankr. S.D.N.Y. 1998) (observing that only if the claim is “facially defective” should
3 standing be denied); *In re iPCS, Inc.*, 297 B.R. at 291 (in determining whether a colorable claim
4 exists, the court must engage in an inquiry “much the same as that undertaken when a defendant
5 moves to dismiss a complaint for failure to state a claim.”). Thus, the Trustee and Committee are
6 only required to establish that the claims are plausible.
7

8 22. The claims against the Connection Parties are colorable. The Trustee and the
9 Committee have conducted, and are continuing to conduct, an extensive investigation of potential
10 claims of the estate. The preliminary facts developed by the Trustee and the Committee
11 demonstrate that causes of action exist against the Connection Parties and that the prosecution of
12 those claims is necessary. The basic facts and reports demonstrate that the potential claims are
13 colorable on their face, and could result in benefit to creditors.
14

15 **The Committee Should Be Granted Authority to Propose Settlements of Causes of Action
16 and Claims Objections**

17 23. The Committee’s ability to attempt to prosecute the causes of action described
18 above would be hindered if the Trustee retained the exclusive right to propose a settlement
19 because, among other things, the splitting of authority to prosecute claims from the authority to
20 settle them could create a disincentive for defendants from entering into settlement negotiations
21 with the Committee. Limiting the Committee to prosecution of claims would create an improper
22 settlement dynamic that may be exploited by potential defendants to the detriment of all general
23 unsecured creditors and the estate. Granting the Committee authority to propose settlements of
24 claims against the Connection Parties and to prosecute and settle objections to the Connection
25 Parties’ claims or setoffs against the estate, subject to Court approval, will enhance the prospect of
26 a prompt and favorable resolution of all claims.
27
28

WHEREFORE, the Committee requests that the Court enter an order: (a) granting the Committee leave, standing, and authority to commence and prosecute claims against the Connection Parties, on behalf of the Debtor's Estate; (b) granting and/or confirming the Committee's authority to enter into tolling agreements with potential defendants; (c) granting and/or confirming the Committee's authority to file and prosecute objections to claims or setoffs of the Connection Parties; (d) granting the Committee leave, standing, and authority to compromise and settle claims against the Connection Parties and objections to the Connection Parties' claims or setoffs against the estate, subject to Court approval; (e) determining that all communications among the Committee, the Trustee, and their respective attorneys and agents in connection with the prosecution of the claims and objections described above, shall remain subject to any applicable attorney-client or work-product privilege and shall be deemed to be in furtherance of a joint-litigation strategy; (f) authorizing the Committee to enter into confidentiality agreements with the Connection Parties; and (g) providing the Trustee and the Committee such other and further relief as the Court may deem just, proper and equitable.

Dated: May 20, 2013

Respectfully submitted,

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1
2 **PROOF OF SERVICE**
3

4 I, Rebekah R. Odom, declare:
5

6 I am a resident of the Commonwealth of Virginia and over the age of eighteen years, and
7 not a party to the within action; my business address is 3190 Fairview Park Drive, Suite 300, Falls
8 Church, Virginia 22042. On May 20, 2013, I served the foregoing *Second Joint Motion of the
Official Committee Of Unsecured Creditors and Allan B. Diamond, Chapter 11 Trustee Pursuant
to 11 U.S.C. §§ 105(a), 1103(c), And 1109(b) for Entry of an Order Granting Leave, Standing,
and Authority to Committee to Prosecute and Settle Causes of Action on Behalf of the Debtor's
Estate* in the following manners.
9

10 x (CM/ECF) The document was electronically served on the parties to this action via
11 the mandatory United States Bankruptcy Court of California CM/ECF system upon filing of
12 above described document.

13 **SEE ATTACHED SERVICE LIST**

14 x (ELECTRONIC MAIL SERVICE) By electronic mail (e-mail) the above listed
15 document(s) without error to the email address(es) set forth below on this date.

16 **SEE ATTACHED SERVICE LIST**

17 x (UNITED STATES MAIL) By depositing a copy of the above-referenced documents
18 for mailing in the United State Mail, first class postage prepaid, at Falls Church, Virginia, to
19 the parties listed on Exhibit A attached hereto, at their last known mailing addresses, on
20 May 20, 2013.

21 **SEE ATTACHED SERVICE LIST**

22 I am employed in the office of a member of the bar of this court at whose direction the
23 service was made.

24 I declare under penalty of perjury that the foregoing is true and correct.
25

26 Executed on May 20, 2013, at Falls Church, Virginia.
27

28 _____
29 /s/ Rebekah R. Odom
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